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Notice and Opportunity for Comment on
Proposed Amendments to the Circuit Rules

Comments are invited on the following proposed amendments to:

No.	Circuit Rule	Title	Description
1.	C.R. 22-1	Certificate of Appealability (“COA”); Capital and Noncapital Cases; and Advisory Cmte. Note to C.R. 22-1	The proposed amendments make it clear that the Court will not grant relief on an uncertified claim without affording the respondent an opportunity to file a response. The amendments also try to clarify how a COA is processed through the court.
2.	C.R. 27-7	Delegation of Authority to Act on Motions; and Advisory Cmte. Note to C.R. 27-7	The proposed amendments are designed to conform with recent amendments to FRAP 27(b) that require a specific motion for reconsideration of a procedural order. Changes to the Advisory Committee Notes are also required to conform to these proposed amendments.
3.	C.R. 27-10	Motions for Reconsideration; and Advisory Cmte Note to C.R. 27-10	The proposed amendments are designed to have all rules dealing with motions to reconsider under one rule. Similar amendments to the Advisory Committee Note are also included.
4.	C.R. 41-2	Timing of Mandate	This new rule clarifies when the mandate issues in cases disposed of by a motions panel.

New or amended language is in **bold**. Comments should be submitted to Cathy A. Catterson, Clerk of Court/Circuit Court Executive, no later than **September 19, 2003**. The full text of the proposed amendments follows:

CIRCUIT RULE 22-1

CERTIFICATE OF APPEALABILITY;
~~CAPITAL AND NONCAPITAL CASES (COA)~~

(a) General Procedures. ~~The procedures set forth in Fed. R. App. P. 22(b) shall apply to requests for certificates of appealability in proceedings under~~ **Petitioners appealing the district court's judgment in either a 28 U.S.C. §§ 2254 and 2255 proceeding should follow the procedures set forth in Federal Rules of Appellate Procedure 4 and 22(b).** A motion for a certificate of appealability ("COA") must first be considered by the district court. If the district court grants a ~~certificate of appealability~~ **COA, the court** it shall state which issue(s) **or issues** satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). ~~The court of appeals will not act on a request for a certificate of appealability~~ **motion for a COA** if the district court has not first ruled ~~first on the request.~~

(b) District Court Records. If the district court denies a ~~certificate of appealability in a section in full in a~~ § 2254 proceeding, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a ~~certificate of appealability in a section~~ **COA in full in a** § 2255 proceeding, the district court clerk shall forward that portion of the record beginning with the filing of the ~~section~~ § 2255 motion.

(c) ~~Denial In Full By District Court; Motion By Petitioner Partial Grant By District Court.~~ If the district court denies a certificate of appealability ~~grants a COA~~ as to all issues, ~~a briefing schedule will be established by the court at case opening and petitioner shall brief only those issues certified or otherwise proceed according to section (e), below.~~ petitioner may, within thirty-five days of the district court's entry of its order denying a certificate of appealability, file in the court of appeals a motion for a certificate of appealability along with a statement of reasons why a certificate should issue as to any issue(s). If no motion for a certificate of appealability is filed, the court of appeals will deem the notice of appeal to constitute a request for a certificate of appealability. In either case, the respondent may file a response within thirty-five days of the notice of appeal or motion, whichever is later. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a certificate of appealability.

(d) ~~Partial Denial By District Court; Motion By Petitioner Denial in Full By District Court.~~ If the district court denies a certificate of appealability in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification **COA as to all issues, petitioner may file a motion for**

a COA in the court of appeals within thirty-five (35) days of the district court's entry of its order (1) denying a COA in full, or, (2) denying a timely filed post-judgment motion, whichever is later. If petitioner does not file a COA motion with the court of appeals after the district court denies a COA motion in full, the court of appeals will deem the notice of appeal to constitute a motion for a COA. If the court appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion. ~~Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issues(s) within thirty-five days of the district court's entry of its order denying a certificate of appealability. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.~~

If petitioner files a motion for a COA with the court of appeals, respondent may, and in capital cases with no pending execution date shall, file a response to the motion for a COA within thirty-five (35) days from service of the COA motion. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a COA.

If, after the district court has denied a COA in full, the motions panel also denies a COA in full, petitioner, pursuant to Circuit Rule 27-10, may file a motion for reconsideration.

When a motions panel grants a COA in part and denies a COA in part, a briefing schedule will be established and no motion for reconsideration will be entertained. Petitioner shall brief only those issues certified otherwise proceed according to section (e), below.

(e) **Briefing Uncertified Issues:** Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes, during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading "**Certified Issues**" and then, in the same brief, shall discuss any uncertified issues under the heading, "**Uncertified Issues.**" Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate. Except, in the

extraordinary case, the court will *not* extend the length of the brief to accommodate uncertified issues.

(f) **Response to Uncertified Issues:** Respondent may, but need not, address any uncertified issues in its responsive brief. The court will afford respondent an opportunity to respond before relief is granted on any previously uncertified issue. **Cross Reference:** Fed. R. App. P. 27; Cir. R. 27-1; Fed. R. App. P. 32(a)(5)(6)(7).

ADVISORY COMMITTEE NOTE TO CIRCUIT RULE 22-1

The court strongly encourages petitioner to brief only certified issues. However, if petitioner concludes that an uncertified issue should be discussed in the opening brief, petitioner shall first discuss certified issues under the heading, “Certified Issues” and then, in the same brief, shall discuss uncertified issues under the heading, “Uncertified Issues.” The court may decline to address uncertified issues if they are not raised and designated as required by this Rule. Motions for broader certification will be decided by motions panels. To the extent a party wishes to ask the merits panel to broaden the scope of the appeal beyond what was allowed by a motions panel of this court, such a motion and any response may be filed in the court of appeals promptly after the completion of briefing. In capital cases it is the practice of the motions panel after ruling on the request to forward automatically all papers relating to the motion to the panel ultimately assigned to consider the merits of the appeal for such consideration as that panel deems appropriate.

CIRCUIT RULE 27-7

DELEGATION OF AUTHORITY TO ACT ON MOTIONS

~~With the approval of the Court, the Chief Judge may delegate to the Clerk or a designated deputy clerk authority to decide motions that are subject to reconsideration by a single judge or appellate commissioner. An order issued by the Clerk or a designated deputy clerk pursuant to this rule shall be subject to reconsideration by an appellate commissioner or single judge if exception is received within 14 days after it is entered, except a prisoner not represented by an attorney shall have 28 days. (rev. 1/96)~~ **The Court may delegate to the Clerk or designated deputy clerks, staff attorneys, appellate commissioners or circuit mediators authority to decide motions filed with the court. Orders issued pursuant to this section are subject to reconsideration pursuant to Circuit Rule 27-10.**

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-7

~~(1) **Motions Acted on by Clerk's Office Personnel**~~

~~(a) **Procedural Motions.** All non-dispositive procedural motions in appeals or other proceedings that have not yet been calendared are acted on by clerk's office personnel under the supervision of the clerk or the appellate commissioner according to guidelines adopted by the court. (Once an appeal or other proceeding has been calendared to be heard on the merits, all motions, substantive and procedural, relating to that proceeding are referred to the merits panel.) Clerk's office personnel may act on procedural motions whether opposed or unopposed, but if there is any question under the guidelines as to what action should be taken on the motion, it is referred to the appellate commissioner.~~

~~(b) **Orders of Dismissal.** The Clerk is authorized to enter orders of dismissal in civil cases where the appellant or parties to an appeal or other proceeding have signed and filed with the Clerk an agreement that the proceeding be dismissed, specifying terms as to the payment of costs. (See FRAP 42 (b).)~~

~~(c) **Motions for Clarification, Reconsideration or Rehearing.** A motion for clarification, reconsideration or rehearing of an action taken by clerk's office personnel is decided by an appellate commissioner or a single judge. A motion for reconsideration of a circuit mediator's order is decided by the administrative judge for the unit from which the matter arose. (rev. 1/99)~~

(a) Procedural Motions. Most non-dispositive procedural motions in appeals or other proceedings that have not yet been calendared are acted on by court staff under the supervision of the clerk, the appellate commissioner, or the chief circuit mediator. Court staff may act on procedural motions whether opposed or unopposed, but if there is any question under the guidelines as to what action should be taken on the motion, it is referred to the appellate commissioner or the chief circuit mediator. Through its General Orders, the court has delegated authority to act on specific motions and to take other actions on its behalf. See, in particular, General Orders, Appendix A, (which are available on the court's website).

CIRCUIT RULE 27-10

MOTIONS FOR RECONSIDERATION

(a) Filing for Reconsideration

Unless the time is shortened or enlarged by order of this court, a motion for clarification, ~~or reconsideration, or rehearing of an~~ **court order must be filed within fourteen (14) days of the date of the order, entered by a motions panel must be filed within 14 days of the date of the order,** except a prisoner not represented by an attorney shall have 28 days.

~~A motion for clarification, reconsideration or rehearing of an order issued by an appellate commissioner shall be decided by a motions panel unless the appellate commissioner grants reconsideration of the order. Such a motion must be filed within 14 days from entry of the appellate commissioner's order, except that a prisoner not represented by an attorney shall have 28 days.~~

A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

(b) Court Processing

~~No answer to a motion will be filed unless requested by the court, but ordinarily the court will not grant a motion without such a request.~~

~~A party may file only one motion for clarification, reconsideration or rehearing of an order entered by a motions panel. (Rev. 7/1/2000)~~

A timely motion for clarification or reconsideration of an order issued by a motions panel shall be decided by that panel. If the case subsequently has been assigned to a merits panel, the motions panel shall contact the merits panel before disposing the motion. A party may file only one motion for clarification or reconsideration of a panel order. No answer to such a motion will be filed unless requested by the court, but ordinarily the court will not grant such a motion without requesting an answer. This rule applies to any motion seeking review of a motions panel order, either by the panel or en banc, and supersedes the time limits set forth in Fed. R. App. P. 40(a)(1) with respect to such motions.

A motion to reconsider an order issued pursuant to Circuit Rule 27-7 by a deputy clerk, staff attorney, circuit mediator, or appellate commissioner is initially directed to the individual who issued the order. If that individual is disinclined to grant the requested relief, the motion for reconsideration shall be processed as follows:

- (1) if the order was issued by a deputy clerk or staff attorney, the motion is referred to an appellate commissioner;
- (2) if the order was issued by a circuit mediator, the motion is referred to the chief circuit mediator;
- (3) if the order was issued by an appellate commissioner or the chief circuit mediator, the motion is referred to a motions panel.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-10

Motions for clarification, reconsideration or rehearing of orders entered by a motions panel are not favored by the Court and should be utilized only where counsel believes that the Court has overlooked or misunderstood a point of law or fact, or where there is a change in legal or factual circumstances after the order which would entitle the movant to relief.

Motions for clarification, reconsideration or rehearing of orders issued pursuant to FRAP 27(b) and Ninth Circuit Rule 27-7 are subject to the reconsideration provisions of Ninth Circuit Rule 27-7.

P-R-O-P-O-S-E-D

CIRCUIT RULE 41-2

TIMING OF MANDATE

In cases disposed of by an order of a motions panel, a mandate will issue seven (7) calendar days after the time to file a motion for reconsideration or rehearing expires pursuant to Ninth Circuit Rule 27-10, or seven (7) calendar days after entry of an order denying a timely motion for such relief, whichever is later.
Cross Reference: 9th Cir. R. 27-10; Fed. R. App. P. 35(c); 40(a)(1)